SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 897.

THE UNITED STATES, APPELLANT,

vs.

FREDERICK S. PASSAVANT ET AL., COMPOSING THE FIRM OF PASSAVANT & CO.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 United States circuit court of appeals for the second circuit.

THE UNITED STATES, APPELLANT,
vs.
FREDERICK S. PASSAVANT, KARL KOTZENBERG, Willian Sandhagen, Heinrich Meyer, Arthur W. Watson, & Oscar Passavant, composing the firm of Passavant & Co., appellees. } Suit No. 1082.

Certificate for instructions.

To the Supreme Court of the United States:

A judgment or decree of the circuit court of the United States for the southern district of New York having been made and entered on the 30th day of January, 1895, by which it was ordered, adjudged, and decreed that there is no error in certain proceedings before the Board of United States General Appraisers in this cause, and that their decision therein be, and the same hereby is, in all things affirmed; and an appeal having been taken from said judgment or decree to this court by the above-named appellants, and the cause having come on for hearing and argument in this court, certain questions of law arose concerning which this court desires the instructions of the Supreme Court of the United States for the proper decision of said cause.

2 The facts from which said questions arise are herewith submitted and certified as follows:

1. Certain merchandise, consisting of cotton velvets, was imported from the Empire of Germany into the port of New York by the appellees in various steamers between May 22, 1891, and March 13, 1892, and was entered at the custom-house and appraised by the appraiser.

2. The merchandise was originally imported into Germany in the gray, and was subjected to processes of dyeing and finishing, and was put in bond in that country.

3. The collector classified the merchandise for duty under paragraph 350 of the tariff act of October 1, 1890, at 20 per centum ad valorem and 14 cents per square yard, and assessed the said rates of duty upon the dutiable value of the merchandise decided by the appraiser and reported by him to the collector.

4. The merchandise was of a description provided for eo nomine in said paragraph 350, and was properly classified for duty under that section.

5. The invoices stated certain prices as the net invoice value of this merchandise. The invoices stated also certain additional sums, under the heading "German duty."

6. This German duty is a tax which is imposed by the German Government on the merchandise when it is sold by the manufacturers thereof for consumption or sale in the markets of Germany, but when the merchandise is purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German Government, and is called "bonification of tax," as distinguished from being refunded as a rebate.

3 7. This German duty or tax is the amount of the duty levied by the German tariff upon the goods when consumed in Ger-

many. It is collected when the finished product goes into consumption in Germany, but is remitted when the finished product is sold in bond for exportation.

8. The merchandise can be purchased in bond for exportation in the principal markets of Germany at the net invoice prices and without paying the so-called German duty. The merchandise involved in this action was so purchased for exportation.

9. In estimating and appraising the actual market value and wholesale price of such merchandise at the time of exportation to the United States in the principal markets of the country from whence imported, the appraiser decided that the dutiable value of such merchandise equalled the sum of the net invoice value and the German duty added together, and reported to the collector this decision as to the dutiable value of the merchandise appraised.

10. In estimating this dutiable value the local appraiser added as an element of dutiable value to the net invoice value these amounts specified in the invoices and entries under the name of "German duty." Such amounts had been included by the importers in their entries under duress, to avoid threatened penalties under the law.

11. The importers did not call for any reappraisement of the merchandise, but within ten days after the liquidation by the collector of each entry, and the assessment by him of the rates of duty aforesaid upon the dutiable valuation so reported to him by the appraiser, filed protests under section 14 of the act of June 10, 1890, against the decisions of the collector, of which the following protest is one, to which the others are similar:

318 & 320 CHURCH STREET, NEW YORK,
July 16, 1892.

4 Hon. J. B. ERHARDT,
Collector of Customs.

SIR: We hereby protest against your decision, liquidation, and assessment of duty at all excess above the rate of 40 per centum ad valorem, and against assessment of duty upon any greater value than marks 24,591.30 and charges on our importation of cotton velvets per "Italia;" entered May 21, 1891; entry No. 80078; entry liquidated June 27, 1891; bond No. 20433.

We further notify you that we are dissatisfied with your decision as to the rate and amount of duty exacted on the entry above referred to, and the assessment of additional duty thereon, and the reasons of our objections thereto are:

1st. That the assistant appraiser and the appraiser in advancing the value of said cotton velvets by the addition of a sum representing a duty to which said goods would have been subjected by the Government of the country of exportation if entered for consumption in said country did not act in accordance with their own judgment, but upon the suggestion of officials of the Treasury Department and without regard to the evidence presented to them.

2nd. That the reappraising officer in advancing the value of said goods beyond the invoice value also disregarded the evidence presented as to

the actual wholesale price and actual market value, and returned said goods at a valuation in excess of said actual market value and wholesale price.

3rd. That as a matter of fact the duty imposed upon goods entering into consumption in the country of exportation did not accrue and could not be imposed upon our said importation herein described under the laws of the country of exportation, because the said goods did not enter into consumption in said country, and it was therefore no part of the wholesale price or foreign market value of said goods at the place and at the time of their shipment to the United States, and duty should not therefore have been imposed by you upon any greater sum than that stated in the invoice and in our entry of said goods based thereon.

* * * * * * *

We pay said duties under compulsion and to obtain possession of our goods, and claim refund of the sum exacted in excess of the duty legally accruing.

Respectfully, PASSAVANT & CO.

To the Board of General Appraisers:

You are hereby notified that we are prepared to sustain by proof our contention as to the matters of fact alleged in the foregoing protest, and will present to you evidence thereon at such time and place as you may designate, reasonable notice of such designation being given to Passavant & Co., 318–320 Church st., N. Y. City.

12. The Board of United States General Appraisers, acting upon said protests, reversed the decisions of the collector on the ground that the so-called German duty was not a lawful element of dutiable value.

13. Thereupon the collector applied to the circuit court of the United States for the southern district of New York by petition praying for review of said decisions by the Board, pursuant to section 15 of the act of June 10, 1890, and the said circuit court upon said petition ordered the Board of United States General Appraisers to return to the circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon, and the said Board of General Appraisers thereafter made such return; and the circuit court affirmed the decision of the Board as aforesaid.

14. It is admitted that Frederick S. Passavant, Karl Kotzenberg, William Sandhagen, Heinrich Meyer, Arthur W. Watson, & Oscar Passavant, the importers, are the persons composing the firm of Passavant & Company.

Upon the foregoing facts this court, for the proper decision of said cause, desires instruction upon the questions of law following:

(1) In proceedings brought before the Board of General Appraisers by protests, under section fourteen (14) of the act of June 10th, 1890, to review the collector's decisions upon the entries in this case, had the Board jurisdiction to enquire into and impeach the dutiable valuation so reported to the collector by the appraiser, as above stated, and upon which the collector assessed the rate of duty to which the merchandise was lawfully subject?

(2) If the first question is answered in the affirmative, was the "German duty" lawfully included by the appraiser in his estimate of dutiable value?

WM. J. WALLACE.
E. H. LACOMBE.
N. SHIPMAN.

6 (Indorsed:) "A." Suit No. 1082. U. S. circuit court of appeals for the second circuit. The United States, appellant, vs. Frederick S. Passavant et. al., appellees. Certificate for instructions. Wallace Macfarlane, United States attorney, attorney for collector. United States circuit court of appeals, second circuit. Filed Feb. 7, 1896. James C. Reed, clerk.

7 UNITED STATES OF AMERICA,
Second Circuit, ss:

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the cause entitled The United States, appellant, vs. Frederick S. Passavant, Karl Kotzenberg, William Sandhagen, Heinrich Meyer, Arthur W. Watson, & Oscar Passavant, composing the firm of Passavant & Co., appellees (suit No. 1082), was duly filed and entered of record in my office by order of said court on the 7th day of February, 1896, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of the State of New York, this 10th day of February, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

[SEAL.] JAMES C. REED,
Clerk United States Circuit Court of Appeals for the Second Circuit.

Indorsement on cover: Case No. 16187. Term No., 897. The United States, appellant vs. Frederick S. Passavant et al., composing the firm of Passavant & Company. (Certificate.) U. S. circuit court of appeals, second circuit. Filed February 12th, 1896.